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No. 85-1731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE CO., AUTO CLUB GROUP INSURANCE CO., and AUTO CLUB LIFE INSURANCE CO., *Petitioners*,

v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, on behalf of themselves and the class of all sales representatives of the Petitioners in the counties of Wayne, Macomb and Oakland, *Respondents.*

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

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CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, on behalf of themselves and the class of all sales representatives of the Petitioners in the counties of Wayne, Macomb and Oakland, *Respondents.*

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

With the consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Peti-

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[1] The consent letters of both counsel have been filed with the Clerk of the Court.

tioners. The Chamber is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on labor relations matters before the courts. Toward this end, the Chamber has filed *amicus curiae* briefs in this Court in a number of labor relations cases, including the two labor preemption cases the Court ruled on this term.[2] The Chamber also previously brought suit successfully challenging the New Jersey Strikebreakers Act as preempted by the National Labor Relations Act.[3]

The case at bar illustrates a recurring conflict between individual employment contract rights arising under state law and collective bargaining rights governed by federal law. The Petitioner asks the Court to examine the accommodation federal law mandates between these rights, and decide whether Michigan common law creating individual implied contract rights can be invoked where its application prevents the exercise of a bargaining option—unilateral implementation after good faith impasse—that is legitimate under federal labor law.

Many Chamber members have collective bargaining relationships with unions. It is of vital concern to these businesses that the ground rules for negotiating be clear and uniform. If individual union members can assert state law claims to collaterally attack valid bargaining tactics, the federal ground rules will be thrown into dis-

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[2] *Colden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. 1395 (1986); *Wisconsin Department of Labor & Industry* v. *Gould Inc.*, 106 S. Ct. 1057 (1986).

[3] *United States Chamber of Commerce* v. *State of New Jersey*, 89 N.J. 131, 445 A.2d 353 (1982).

array, and the laissez-faire zone of conduct which Congress intended to be controlled by the free play of economic forces will be vitiated. Moreover, allowing such claims would create an influx of litigation by unionized employees over implied contracts and employment-at-will exceptions similar to the current flood of such suits by non-union employees.[4] It is crucial for the Court to make clear that the collective bargaining relationship is governed exclusively by federal labor law, and that such state claims are preempted by the National Labor Relations Act. Because the Chamber is in a unique position to make the Court aware of the pervasive impact on the business community of these important issues, it submits this brief and urges the Court to grant *certiorari*.

STATEMENT OF THE CASE[5]

This case arises from a lawsuit brought by seven discharged sales representatives against their former employers, five corporations acting under the umbrella of the Automobile Club of Michigan (collectively "the Club"). The workers asserted, pursuant to Michigan common law, that the Club had breached an implied contract not to terminate them without just cause,[6] which allegedly was created prior to the certification of a

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[4] *See generally Evangelista* v. *Inlandboatmen's Union*, 777 F.2d 1390, 1401 (9th Cir. 1985) ("[Plaintiff] claims that her demotion in seniority violates the state's 'important interest in protecting its citizens from harassment on the job.' Were Evangelista correct, virtually every wrongful discharge action would be exempt from preemption, a result which the Supreme Court indicated that it did not embrace."); *Costello* v. *United Parcel Service, Inc.*, 617 F. Supp. 123, 126 (E.D. Pa. 1984), *aff'd mem.*, 774 F.2d 1150 (3d Cir. 1985) ("[t]here is at least an arguable 'public policy' component in most discharge decisions").

[5] As the Petitioner has set forth the factual background in detail, only a brief summary is presented here.

[6] Other aspects of the workers' claims are not addressed here.

union.[7] The Club had discharged the workers for failure to meet sales requirements it had implemented unilaterally after bargaining to impasse with the Union.[8]

The Club argued that the suit was preempted by the National Labor Relations Act, as it had exercised a valid bargaining option, a peaceful economic weapon, which could not be attacked collaterally under state contract law. The Michigan courts rejected this argument and allowed the action to proceed. The Michigan Court of Appeals stated that the question presented in state court was different from that which would have been presented to the National Labor Relations Board, and ruled that an employer's "common law right to implement its final offer" is "limited by [its] common law duty to honor its contracts of employment." Pet. App. at 12a, 15a. The Michigan Supreme Court denied the Club's application for leave to appeal, Pet. App. at 1a, and the instant Petition followed.

ARGUMENT

The interaction between individual contract rights under state law and federal collective bargaining rights has assumed increasing importance since this Court's last discussion of the issue in *J.I. Case* v. *NLRB*, 321 U.S. 332 (1944). Considerable change in the law governing employment rights has occurred on both the state and federal levels. A number of different state law causes of action have developed for wrongful discharge, breach

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[7] The Club's employees elected the Michigan AAA Sales Association ("the Union") as their exclusive bargaining representative in February, 1978. *See* Opinion of the Michigan Court of Appeals, 138 Mich. App. 488 (Nov. 5, 1984), reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") 3a, at 6a.

[8] The Club made its final offer in July, 1981 after numerous unsuccessful negotiating sessions. When the Union rejected this offer, the Club declared an impasse and implemented the terms reflected in the offer, including minimum production standards for sales representatives. *Id.* at 6a-7a.

of implied contract, and breach of the covenant of good faith and fair dealing, eroding the traditional employment-at-will doctrine.[9] At the same time, in the collective bargaining arena, recognition has evolved that exercising pressure tactics to induce compromise, including unilaterally changing employment terms after impasse, is a legitimate option under the federal labor statutes. These two evolving areas of law have clashed in the instant case, and present to the Court the vital need for clarification of their appropriate accommodation.

I. THE MICHIGAN COURT'S DECISION ALLOWS INDIVIDUAL CONTRACT RIGHTS UNDER STATE LAW TO SUPERSEDE FEDERAL COLLECTIVE BARGAINING RIGHTS, OPENING THE DOOR TO WHOLESALE STATE INTERFERENCE WITH COLLECTIVE BARGAINING.

The court below held that the exercise of valid collective bargaining options is subject to restriction by state common law principles, and called this restriction "an appropriate accommodation of the parties' rights." Pet. App. at 15a. This conclusion imposes substantial limitations on federally regulated bargaining options, and has serious implications for national labor policy.

As this Court has recognized, *Congress* struck the "balance . . . between the conflicting interests of the union, the employees, the employer and the community," and this balance included allowing the use of legitimate "weapon[s] of self-help." *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 259 (1964).[10] The National Labor

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[9] The dramatic outgrowth in this area of law has been discussed by numerous commentators. *See, e.g.*, Stieber, *Recent Developments in Employment at Will*, 36 Lab. L.J. 557, 559-60 (1985); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law. 1 (1984).

[10] *See also Golden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. 1395, 1399 (1986) ("Congress' decision to prohibit certain

Relations Act ("the Act") requires parties to bargain in good faith, but leaves them free to agree or not to agree, and to use or decline to use legitimate pressure tactics as a method to reach agreement.[11] As the Court stated in *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477, 489 (1960):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other incline to agree on one's terms—exist side by side.

Accordingly, state regulation in the labor area "concerning conduct that Congress intended to be unregulated," [12] including "[r]esort to economic weapons should more peaceful measures not avail," [13] is prohibited under what has become known as the *Machinists* [14] preemption

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forms of economic pressure while leaving others unregulated represents an intentional balance 'between the uncontrolled power of management and labor to further their respective interests' ") (citations omitted).

[11] Unilateral implementation of an employer's final offer after bargaining impasse is one such tactic, and is a legitimate component of the bargaining process, so long as the employer has bargained in good faith to impasse. *See, e.g., NLRB* v. *Katz*, 369 U.S. 736, 745 and n.12 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224 (1949); *Western Newspaper Publishing Co.*, 269 N.L.R.B. 355 (1984); *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom. American Federation of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[12] *Golden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. at 1398, *quoting Metropolitan Life Insurance Co.* v. *Massachusetts*, 105 S. Ct. 2380, 2394 (1985).

[13] *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 317 (1965).

[14] *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relation Comm'n*, 427 U.S. 132 (1976).

doctrine. *See Golden State Transit Corp.* v. *City of Los Angeles*, 106 S. Ct. 1398-99; *Machinists*, 427 U.S. at 147; *Morton*, 377 U.S. at 259. States may not impose their own unique common law restrictions in a manner which, as here, interferes with the federal scheme. Far from adopting an appropriation that would allow such interference, as suggested by the court below,[15] the Court in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), examined actions that were *not* bargaining tactics (the employer had discharged strike replacements after promising that they would not be discharged), and concluded that "the normal rules of law" govern the relationship between employers and "innocent third parties." 463 U.S. at 500.

In contrast, the NLRA alone governs the bargaining relationship between parties to a labor dispute. Allowing collateral state regulation, even indirectly, would have an enormously disruptive effect on the bargaining process and the federal regulatory scheme. For example, in this case, state recognition and enforcement of the alleged implied contracts would, in effect, bar the Club from implementing its desired production standards. If the impasse continued over an extended period, the workers' terms of employment would be governed by state law during that time, yet the employer would be precluded by federal law from negotiating with the individual employees.

Thus, even state regulation which does not govern the labor negotiation process directly may in application result in the precise type of interference prohibited by *Machinists*, that which "frustrate[s] effective implementation of the Act's processes." 427 U.S. at 147-48, *quoting Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969). The Court should reiterate that while such state regulation is not

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[15] *See* Pet. App. at 15a.

preempted entirely, it may not be invoked or applied where it results in this type of disruption.

Another aspect of the Michigan court's holding threatens to create an imbalance in the federal/state framework of employment rights. The court held, based on *J.I. Case* v. *NLRB*, 321 U.S. 332, that individual contract rights are not extinguished until the parties enter into a valid collective bargaining agreement. Pet. App. at 17a. This conclusion is not only incompatible with labor law principles, but would generate wholesale state regulation of the negotiation process. Under this broad rule, most employers' pre-agreement bargaining options would be foreclosed, because exercising them would give rise to state law causes of action under various contract and tort theories. This certainly was not the result contemplated by Congress. If *J.I. Case's* dicta can be read to have created such a rule, the Court now should clarify that such a reading is erroneous.

J.I. Case established that individual contracts may not be availed of to defeat the Act's processes. 321 U.S. at 337. Extending that decision to support the proposition that individual contract rights are extinguished only when a collective agreement is entered would wreak havoc on the collective bargaining process. In recent years, the states have accorded employees broad individual implied contract rights. *See* n.9, *supra.* The Court should clarify that the results of collective bargaining, whether a contract, an impasse,[16] a strike, or a lockout, supersede such individual rights. As the Court stated in *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967), national labor policy "extinguishes the individual employee's power to order his own relations with his em-

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[16] *See Morio* v. *North American Soccer League*, 501 F. Supp. 633, 639 (S.D.N.Y.), *aff'd*, 632 F.2d 217 (2d Cir. 1980) (individual contract rights must be maintained "unless and until an agreement *or a good faith impasse* is reached through bargaining with the Union" (emphasis added)).

ployer and creates a power vested in the chosen representative to act in the interests of all employees."

II. THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE THE WIDESPREAD CONFUSION ABOUT THE SCOPE OF *GARMON* PREEMPTION.

The Chamber submits that *Machinists* preemption precludes Respondents' state law claims. Moreover, the decision below reflects the confusion that exists among the lower courts about the application of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny, and accentuates the urgent need for this Court to clarify the import of those decisions.

"*Garmon*" preemption protects the federal scheme of labor regulation and the exclusive jurisdiction of the National Labor Relations Board ("the Board") by preventing states from regulating or providing remedies for conduct arguably governed by the Act. As the rule originally was articulated: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." 359 U.S. at 245. The *Garmon* Court focused on the "activities which [the] State purports to regulate," and concluded: "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244.

However, the Court's discussion of *Garmon* preemption in several subsequent cases has created confusion as to the appropriate inquiry to be made before holding a state claim preempted. In *Farmer* v. *United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 297, 302 (1977), the Court stated that the *Garmon* rule should not be applied mechanically, but rather, "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme" must be

examined. The *Farmer* Court examined the *focus* of the state court action, and determined that its adjudication in that case would not necessitate resolving the merits of the underlying labor dispute. *Id.* at 304-05. Thus, the Court concluded that the state law claim was not preempted, but reiterated that "state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." *Id.* at 305.

The following term, in *Sears Roebuck & Co.* v. *San Diego District Council of Carpenters*, 436 U.S. 180, 197 (1978), the Court repeated its emphasis on the *focus* of the dispute, holding that it must examine the controversy presented to the state court and the controversy that could be presented to the Board, and determine whether they are *identical.* A state court's exercise of jurisdiction was held to create a risk of interference with the unfair labor practice jurisdiction of the Board only when these controversies are identical. The Court subsequently repeated this rationale in *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. at 681, and *Belknap, Inc.* v. *Hale*, 463 U.S. at 510.[17]

The lower courts have responded with confusion to the Court's narrow focus on the identity of the controversies before the Board and the court, unsure of where the factor of threatened interference with the federal scheme fits in. The Fifth Circuit has held state law contract and wrongful discharge claims preempted under *Garmon*, noting that the holdings in *Belknap, Sears* and *Farmer* leave

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[17] Of course, in *Belknap*, the rights at stake were those of workers who were not parties to the bargaining dispute and had no access to Board remedies. *See* discussion at p. 7, *supra.* The Court later noted the importance of this distinction in *Golden State*, 106 S. Ct. at 1400 n.7, stating: "There is no issue here that, rather than regulating the relationship between the employer and the union, the city's action protected innocent third parties from the employer. *See Belknap* . . . ."

the limits of *Garmon* preemption "unsettled." *Gray* v. *Local 714, International Union of Operating Engineers*, 778 F.2d 1087, 1090 n.2 (5th Cir. 1985). The Ninth Circuit has cited *Farmer* in support of its holding that a former union member's state tort claims for breach of the covenant of good faith and fair dealing, wrongful interference with a business relationship, intentional infliction of emotional distress, and constructive discharge were preempted by federal labor law, as they "*arose out of the same acts and conduct* which forms the basis of [plaintiff's] section 301/breach of duty claims." *Carter* v. *Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985) (emphasis added). The Ninth Circuit also has held preempted a union's claims of tortious interference with a prospective contractual relationship, stating that under *Garmon*, the Board has "exclusive jurisdiction over *activities that threaten to interfere with national labor policy*." *Lumber Production Industrial Workers Local 1054* v. *West Coast Industrial Relations Ass'n*, 775 F.2d 1042, 1045 (9th Cir. 1985) (emphasis added).[18]

In contrast, the Michigan court below held that since the Board would not determine whether the Club's actions constituted a breach of the workers' individual employment contracts, the *Garmon* doctrine was inapplicable and the state law claims could proceed. Pet. App. at 12a. The Michigan court simply ignored the admonition in *Jones* that the *Garmon* doctrine requires "the substantive preemption by the federal labor law in the areas to which it applies." 460 U.S. at 680.

It is evident that the lower courts are unsure about how to apply *Garmon* preemption, and need instruction

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[18] *See also Serrano* v. *Jones & Laughlin Steel Co.*, 99 Daily Lab. Rep. (BNA) D-1, D-4, D-5 (6th Cir. May 8, 1986) (court held state law fraud claims preempted under *Garmon*, declaring: "No matter how it is stated, the gravamen of the three fraud charges is that [the company] did not bargain in good faith . . ." and "[t]his [fraud] claim . . . implicates a section 8(d) duty").

from this Court. It is clear that the Act does not preempt all state regulation of the terms and conditions of employment.[19] It is likewise clear that a state law claim is preempted if it presents to a state court the *same* issue that could be presented to the Board. The Court should clarify that state law claims which present a different controversy in state court, but whose resolution creates a threat of undue interference with the federal regulatory scheme, are preempted.[20]

The Chamber submits that there is a real threat that maintenance of a state court action here will impair the Board's function. While a state court's focus on the elements of breach of implied contract would differ from the Board's focus on the elements of good faith bargaining and bona fide impasse, a state court determination that a contract right exists and damages are warranted

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[19] *See Malone* v. *White Motor Corp.*, 435 U.S. 497, 504-05 (1978) ("there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining"). *Accord, Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1912 n.7 (1985).

[20] The Court also should clarify the weight to be given in the preemption analysis to the remedies sought by the party. At least one circuit has discussed this factor. *See Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359, 364 (5th Cir.), *cert. denied*, 105 S. Ct. 433 (1984) ("[t]he *Belknap* plaintiffs, for example, did not seek a remedy that, had it been awarded by a state court, would have encroached on the function of the National Labor Relations Board, because the Board could not have granted any relief to the plaintiffs"); *see also Costello* v. *United Parcel Service*, 617 F. Supp. at 126 ("[w]hile this may be true [that punitive damages are not available in the collective bargaining context], I am not convinced that this additional remedy is of sufficient import to tip the balance"). *But see Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981), *quoting Garmon*, 359 U.S. at 247 ("That the state-court suit [in *Garmon*] was one for damages rather than for the type of relief available from the NLRB weighed against preemption, not in favor of it. . . . 'to allow the State to grant a remedy here which has been withheld from the NLRB only accentuates the danger of conflict.'").

as a result of the Club's use of a legitimate bargaining option would critically impair federal regulation of the collective bargaining process. Where, as here, actions are undertaken pursuant to the federal structure of bargaining, it is exclusively the Board's function to review the propriety of the conduct and, if necessary, provide a remedy. State laws may not be applied, nor may state law claims be allowed to proceed, if they interfere with this scheme.

CONCLUSION

The Chamber submits that the decision below will have a destructive effect on the federal scheme of collective bargaining regulation and create dangerous avenues for state law challenges of collective bargaining results. For these reasons, the Chamber urges the Court to grant review.

Respectfully submitted,

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